IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.82 of 1984

WITH

SECOND APPEAL NO.83 of 1984

**SECOND APPEAL NO.82 OF 1984**

1. Madhav Narayan Agaskar
2. Vinayak Narayan Agaskar
(Transposed as R. No.4) ..Appellants

(Orig. Deft. Nos.3 and 4)

V/s

1. Smt. Savitribai Narayanaji Bhat
since deceased her heirs and
L.rs.
1A. Sou. Rasila Koshore Pandya
1B. Sou. Sarala Wamanrao Adhyarh

2. Chhotalal Narayanji Bhat
Since deceased by his legal heirs :
2-A Smt. Taramati Chhotalal Bhat
2-B Shri Pradip Chhotalal Bhat
2-C Nutan Sanjay Vaidya
2-D Miss Nita Chhotalal Bhat
2-E Miss Alpana Chootalal Bhat

2-F Smt. Savitribai Narayanji Bhat

3. Vasant Narayan Agaskar

4. Vinayak Narayan Agaskar ... Respondents

(Nos.1 and 2, Original Plaintiffs

No.3 Original Defendant No.2)

Shri S.G. Deshmukh for Appellant

Mr. Haridas for Mr. P.N. Joshi for Respondent Nos.1-A, 1-B,2-A to 2-E.

Mr. A. Joshi for Respondent No.4

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3. Vasant Narayan Agaskar
4. Vinayak Narayan Agaskar ... Respondents
(Nos.1 and 2, Original Plaintiffs
No.3 Original Defendant No.2)

Mr.S.G.Deshmukh for Appellants
Mr.Haridas i/b P.N.Joshi for Respondent nos.1a 1b, 2a to 2f
Shri A.V.Joshi for Respondent no.4

CORAM:S.R.SATHE,J.
DATED:16th Jan. 2007

**ORAL JUDGMENT** :-

1. The Appellant original defendant no.3 in Regular Civil Suit No.21 of 1978 has filed these Second Appeals challenging the judgment and order passed by the Court of the Extra Assistant Judge, Thane in Civil Appeal

No.199/1981 and 198/1981 respectively, whereby Civil Appeal No.199 of 1981 filed by the defendants was dismissed and Civil Appeal No.198 of 19081 filed by the plaintiffs was allowed and suit was decreed in plaintiff's favour.

2. For the sake of convenience hereafter the parties shall be referred to as the plaintiff and defendants.

3. Brief facts giving rise to these second appeals are as under :-

. The suit property bearing City Survey No.304 situated at Thane was initially owned by the defendants. There were two buildings in the said property known as 'Saraswati Niwas' and 'Rama Niwas' belonging to the defendants, who were the members of Agaskar family. The said property was initially owned by Narayan Ganesh Agaskar. His son Jaywant Narayan Agaskar filed a suit for partition of the said property against his step mother Indira Narayan Agaskar and step brothers viz. Vasant Narayan Agaskar, Madhav Narayan Agaskar and Vinayak Narayan Agaskar. In the said suit bearing Suit NO.43 of 1950, preliminary decree was passed and Advocate Shri B.G.Oka was appointed as a Court Commissioner for taking accounts as well as for partition of the suit property. Parties to the said suit requested the Court to sell the suit property

‘Saraswati Niwas’ by auction and for that purpose also Advocate Shri B.G.Oka was appointed as Court Commissioner. Accordingly, auction took place on 13-4-1953 and Narayan Vallabhaji Bhatt, husband of the present plaintiff no.1 and father of present plaintiff no.2 purchased the said property by giving maximum bid. The terms and conditions of the sale were also fixed at that time and in pursuance of the same with the consent of the parties, the Court Commissioner, Advocate Shri B.G.Oka executed the sale deed in favour of Narayan Vallabhaji Bhat and present plaintiff nos.1 and 2. As per the sale deed Bhatts the then purchasers of Saraswati Niwas were given right to use the passage of 12’ width going through the property viz. ‘Rama Niwas’. However, in the first or second week of January 1978 the plaintiffs noticed that defendants were trying to make an encroachment on their property on the East-South corner and were trying to place the cycles in the place which was owned and possessed by the plaintiffs. Not only that while carrying out repairs of the wire fencing dividing the two properties the defendants encroached upon the portion of one foot though objection was taken by the plaintiffs. The defendants started a cycle stand in the passage and thereby blocked the approach road for going to the plaintiffs’ property ‘Saraswati Nivas’. According to the plaintiffs the said 12’ width passage was in fact given to them free of charge as owners. The defendants in spite of repeated requests did not stop

making use of the said passage for keeping bicycles and thus committed breach of the covenant in the sale deed. The defendants did not leave any space in the said passage whereby municipal vehicles can be taken to the septic tank situated in the plaintiffs' property. The plaintiffs, therefore, filed suit for declaration and injunction on 23-1-1978 and prayed for declaration that defendants have no right, title or interest in respect of the portion marked with hatch line on the map attached to the plaint and that they have no right, title or interest in respect of portion of 12' width passage from South to North as shown by letters ABCD in the attached plan. The plaintiffs also asked for declaration that they have a right to take the municipal vehicles for entering 'Saraswati Niwas' from Southern open space of the defendants property running East West and also turning to North at the back of the property of the defendants as per sale deed dated 20-7-1953. The plaintiffs also asked for possession of 1 foot width area running from West to East shown by letters BDEFG in the map attached to plaint. Consequently, the plaintiffs also prayed for permanent injunction restraining the defendants from keeping any vehicle or making any obstacle in the 12' width passage shown on the plan as ABCD leading to road just touching to the Station Road.

4. The defendant nos.1 to 4 filed their joint written

statement and opposed the suit claim. They contended that as per sale deed dated 20-7-1953 plaintiffs have been given only right of way to go through the property viz. 'Rama Niwas' and the plaintiffs are not the owners of the said portion and they have not become owners of the said portion. The right, which is given to the plaintiffs is in the nature of an easement of right of way and as such the plaintiffs are not entitled to create any more burden than necessary for the enjoyment of plaintiffs' property. As there was no other way than the suit way for Bhatts to go to their property they were given right of only egress and ingress through the passage and the way which is given to the plaintiffs was only by way of an easement of necessity. According to the defendants, for egress and ingress way of 5' width was sufficient. So, if the Court Commissioner has given right of way more than that but without the permission of the defendants then same is not binding on the defendants 2 to 4 as they were minors at the time of execution of the said sale deed.

5. The defendants also contended that they have not made encroachment on plaintiffs' property. On the contrary, right from 1-9-1964 the defendants were all along keeping their vehicles and scooters in the said passage in such a manner that it was not causing any obstruction for approaching the plaintiffs' property. According to the defendants the plaintiffs had in fact

agreed before the City Survey Officer that they have been given a right of way only and accordingly entry be made. Defendants also contended that on the first floor of 'Rama Niwas' there was court of Judicial Magistrate, F.C.. during 1952 to 1963 and attached property in the prohibition cases used to be dumped by the site of the Western wall in the said passage to the extent of about 6' width. Thus, the defendants contended that right from 1948 to 1963, at no point of time passage of 12' width was kept open and only passage of about 6' width was kept open. The defendants therefore contended that the case of the plaintiffs that they have been given a right having a way of 12' width is not legal and correct and they are not entitled for any declaration and injunction. Hence on all these grounds the defendants prayed for dismissal of the suit.

6. On these pleadings the learned trial Judge framed issues at Exh.42. In order to prove the suit claim plaintiff no.2 examined himself at Exh.52 and produced certain documents. As against this, on behalf of the defendants, the original defendant no.3 Vasant Agaskar examined himself at Exh.54 and produced certain documents. After considering the evidence adduced by both the parties the learned trial Judge came to the conclusion that the plaintiffs have proved that by virtue of sale deed dated 20-7-1953 Exh.44A plaintiffs have been given 12' width passage shown by the letters

ABCD in the map attached to the plaint and they have got a right to take vehicle through the same. The learned trial Judge also held that defendants have failed to prove that plaintiffs have only given easementary right through defendants' property. The learned trial Judge held that the plaintiff has failed to prove the alleged encroachment of 1 foot width portion. Hence the learned trial Judge issued permanent injunction restraining defendants from causing any obstruction to the use of the passage running South North shown by letters ABCD in the plan attached to the plaint. It was also declared that plaintiffs have a right of taking municipal vehicles through defendants' property running East West and also turning to North at the back of the property of the defendants i.e. 'Rama Niwas'.

7. Being aggrieved by the findings recorded by the lower court that the plaintiffs are not entitled for possession of 1 foot width in area running from East to West shown in the map by letters BDEFG the plaintiffs filed Civil Appeal No.198 of 1981. The defendants also filed Civil Appeal No.199 of 1981 and challenged the order passed by the learned trial Judge whereby it was held that the plaintiffs have been given proprietary title in respect of 12' width passage shown as ABCD in the map attached to the plaint. They also challenged the findings that the defendants obstructed the plaintiffs for enjoyment of their easemnetary right by

parking their cycles and scooters in the part of the passage. The defendants contended that the learned trial Judge ought to have held that easement of reasonable width i.e. 5’ to 6’ passage was only granted in favour of the plaintiffs. The defendants therefore prayed that the appeal be allowed and the suit be dismissed.

8. After hearing the learned Advocate for the parties in the above mentioned second appeals, both the appeals were disposed of by the Extra Assistant Judge, Thane by common judgment and order. The appeal filed by the defendants bearing NO.199 of 1981 was dismissed with costs while the appeal No.198 of 1981 was allowed and it was declared that the defendants should not in any way cause encroachment on the space near the privy shown in the plaint map by oblique lines and they were also restrained from using the passage shown by letters ABCD in the map attached to plaint.

9. Being aggrieved by the above mentioned common judgment and order passed by the Extra Assistant Judge, Thane, the original defendant no.3 Madhav Narayan Agaskar has filed Second Appeal No.82 of 1984 against the order passed in Civil Appeal No.199 of 1981 and Second Appeal No.83 of 1984 against the order passed in Civil Appeal No.198 of 1981.

10. As both these second appeals are arising out of common judgment, these appeals are also being disposed of by this common judgment.

11. From perusal of the record it appears that Second Appeal No.82 of 1984 is admitted by this Court (Coram: Pratap, J) with following order.

. "Admit, notice on ground Nos. 3 and 4".

. The said grounds are as under :-

"Ground no.3: Whether both the Courts below erred in not appreciating that the court Commissioner, who executed the sale deed at Exhibit 44 and had no authority to grant 12′ wide access to the purchasers of the Sraswati Niwas and as such the said covenant was not binding on the defendants and especially the defendants nos.2, 3 and 4 were minor when the sale deed was executed.

Ground no.4: Whether both the Courts below erred in not appreciating that when the property of Saraswati Niwas was sold, the purchaser was entitled merely to an easement of necessity viz. the reasonable passage to his property from the remaining property and whether both the Courts below failed to appreciate the provisions of

Section 14, Section 22, Section 28 and Section 47 of the Indian Easements Act in that behalf".

12. Similarly, while admitting Second Appeal No.83 of 1984, following order was passed :

. "Admit, notice on ground nos. 2 and 3".

. The said grounds are as under :-

"Ground no.2: That the learned Extra Assistant Judge erred in holding that the Defendant no.2 Vasant Narayan Agaskar has admitted encroachment by the Defendants on the properties of the Plaintiffs in this behalf, the learned Extra Assistant Judge, erred in not properly appreciating the situation of the septic tank and the map and the sale deed at Exh.44.

Ground no.3: That the finding of the learned Extra Assistant Judge, Thane that the space near the privy marked by oblique lines is of the ownership of the plaintiffs is contrary to the sale deed and the evidence on record. The learned Extra Assistant Judge failed to appreciate that the septic tank was common to both the properties and as such could not be held to be of the exclusive ownership of the plaintiffs and no injunction could

be granted in favour of the plaintiffs against the defendants who are also the owners of the septic tank".

13. Admittedly, now the dispute is only in respect of suit way i.e. the passage of 12 feet width shown by the letters ABCD.

14. In the instant case it is not in dispute that two buildings ‘Saraswati Niwas’ and ‘Rama Niwas’ situated in City Survey No. 304 Thane were initially owned by Narayan Agaskar. Jaywant son of Narayan filed suit for partition against his step brothers and mother i.e. Special Civil Suit No.43 of 1950. After preliminary decree in that suit, parties agreed to dispose of the suit property ‘Saraswati Niwas’ by auction. Not only that but admittedly for that purpose Advocate Shri B.G.Oka was appointed as Commissioner and in the auction which took place Bhatts i.e. present plaintiffs purchased the building named ‘Saraswati Niwas’. It is in fact admitted by the defendants that in the said sale deed it was specifically mentioned that Bhatts will have a right of way of 12’ width through the property of the defendants viz. ‘Rama Niwas’ and the said way has been shown by letters ABCD in the map attached to the plaint in 21 of 1978. However, now the main contention of the defendants is that at the time of sale deed Vasant Narayan Agaskar, Madhav Narayan Agaskar (i.e. present

Appellant) and Vinayak Narayan Agaskar were minors and the Commissioner had in fact no right to give way of 12’ width. Besides this it is also the main contention of the defendants that though there was such stipulation in the sale deed 12 feets width passage was not actually used by the parties and since the year 1950 or thereabout the property of the Court of Judicial Magistrate, F.C. which was then located on the first floor of Rama Niwas, was dumped in the said passage and only a passage of about 6’ width was used by the plaintiffs and as such the alleged right if any in favour of the defendants’ stand extinguished.

15. Shri S.G.Deshmukh, learned Advocate for the defendant firstly argued before me that the plaintiffs had filed Regular Civil Suit no.21 of 1978 alleging that passage of 12’ width is in fact sold to plaintiffs and as such they had based their claim as owners of the said passage. However, both the Courts below held that the said passage shown by letters ABCD in the map attached to the plaint is not actually purchased by the plaintiffs but they have been given only right of way in respect of the said passage. So, according to him when plaintiffs had not pleaded the case of easement, the plaintiffs suit ought to have been dismissed. As against this, Shri Hardas, learned Advocate for the defendants submitted that defendants have in fact clearly admittedly in their written statement that

plaintiffs are having a right of way through their property. So, when such was the position, the Court was justified in granting relief to the extent of plaintiffs' easmentary right.

16. Shri Deshmukh, learned Advocate for the defendant submitted that the plaintiffs are not entitled to take advantage of the contentions taken by the defendants in their written statement because though in the written statement the defendants had contended that plaintiffs have been given right of way at the same time they had contended that the said right of way was only to the extent of 5' to 6' that is the space which is necessary for egress and ingress. So, while considering the admission given in the written statement the admission must be taken as a whole or not at all. In order to substantiate this proposition he has placed reliance on a case **Smt.Ramsurat Devi V/s Smt.Satraji Kuer and Ors. AIR 1975 PATAN 168**. It is true that in this authority the Division Bench has held that as long back as in the year 1937, in a case **Shiv Saran Rai Vs. Sukhdeo Rai (AIR 1937 PATNA 418)** it was held that it is not open to the court of fact to dissect an admission in parts arising out of the pleadings but the court must take the whole of it into consideration. This view has been endorsed in a case **Indermal Tekaji Mahajan Vs Ramprasad Gopilal (AIR 1970 M.P. 40)** wherein also Their Lordships have observed that true principle is that if a written

statement incorporates an admission of some facts favourable to the plaintiff and a denial of certain other facts favourable to him or an assertion of still other facts which are unfavourable to him, he (plaintiff) must, if he wants to take advantage of the admission, take not only the first set of facts as truly stated but also the second set of facts as so stated. But the principle is limited in application to facts and does not embrace within its ambit any plea of law raised by the defendant on the cumulative effect of the two sets of facts. The above proposition of law is not disputed and cannot be disputed. However, the above cited rulings are of no use to the present defendants because in the instant case the admission is not in respect of two different sets of facts. The fact that in the sale deed Exh.44A right of way to the extent of 12′ width is mentioned is admitted. But now the defendant is contending that though it is mentioned accordingly plaintiffs are not entitled to have it as according to them only portion of 5′ to 6′ width is sufficient for egress and ingress or such portion is sufficient to fulfil the easement of necessity. So, it must be borne in mind that in the instant case there is no question of accepting admission in respect of one set of fact and rejecting the admission or assertion made by the defendants in respect of other set of facts. This is not a case where two sets of facts are pleaded. Only one set of fact is pleaded and admitted in W.S.

Defendants are only putting their own interpretation to it as it suits them. So, the above cited rulings are certainly of no help to the the present defendants.

17. It is worth to note that not only in written statement the defendants have admitted that in the sale deed it is mentioned that 12’ width passage is kept for going to the plaintiffs’ property but even in his evidence the defendant Vasant Narayan Exh.54 has admitted that a passage was given through their property i.e. ‘Rama Niwas’ for the occupants of ‘Saraswati Niwas’ and the sale deed mentions that the said passage is of 12’ width. So, when the defendants admit that there is mention of 12’ width passage in the sale deed for the occupants of Saraswati Niwas, the Courts below were justified in granting relief to that extent and holding that plaintiffs are having easementary right in respect of passage of 12’ width. While doing so the courts below have in fact granted lesser relief than the relief claimed by the plaintiffs. It is true that in the instant case plaintiffs came out with a case that 12’ width portion was sold to them or that they are the owners of the said passage. They had not specifically made out an alternative case regarding easement with regard to that passage which normally they could have done. But when we find that even the defendants’ admit that plaintiffs are having right of easement the courts were justified in granting the said relief and holding

that the plaintiffs are having easementary right with regard to the said passage. This is obviously because where alternative case which plaintiff could have made, but did not make in plaint, is admitted by the defendants in written statement, it is permissible to grant to plaintiff relief on that basis. It has been so held even in a case cited on behalf of the defendants i.e. **AIR 1970 MP 40**. In fact position in this behalf has been led down by the Apex Court in **Firm Sgrubuvas Ram Kumar Vs Mahabir Prasad AIR 1951 SC 177** wherein Their Lordships have observed :

> "The rule undoubtedly is that the Court cannot grant relief to the plaintiff on a case for which there was no foundation in the pleadings and which the other wise was not called upon or had an opportunity to meet. But when the alternative case, which the plaintiff could have made, was not only admitted by the defendant in his written statement but was expressly put forward as an answer to the claim which the plaintiff made in the suit, there would be nothing improper in giving the plaintiff a decree upon the case which the defendant himself makes.A demand of the plaintiff based on the defendant’s own plea cannot possibly be regarded with surprise by the latter and no question of adducing evidence on these facts would arise when they were expressly admitted by the

defendant in his pleadings".

. So, in my opinion, the Courts below have not committed any error while granting relief in respect of right of easement in favour of the plaintiffs.

18. There is also another aspect of the matter. Though the plaintiffs have claimed right as owner in respect of suit passage, ultimately on the basis of admissions of the defendant in written statement, admissions of defendant in his oral evidence and other evidence adduced by the plaintiffs, plaintiffs have certainly proved that right of easement in respect of the suit passage marked as ABCD was given to him under sale deed Exh.44A executed on 20-7-1953. So, both the Courts were justified in granting relief to plaintiff. It is well settled that where plaintiff has claimed a higher right but has been able to prove only a lesser right or entitlement to relief, held, such plaintiff would not be disentitle from succeeding in his suit so long as lesser right substantiated by him is sufficient in law to entitle him to a relief against the defendant. It has been so held in a case **R.Kapilnath (Dead) through L.Rs V/s Krishna (2003) SCC 444**. So, I have no hesitation to hold that there is no substance in the argument advanced by the learned Advocate for the defendants that courts were not right in granting the lesser relief to the plaintiffs.

19. From the pleadings of the parties and evidence on record and even from the submissions that have been made before me by both the learned Advocates it is quite clear that plaintiffs were given right of easement in respect of the suit passage by the sale deed dated 20-7-1953. Naturally, it becomes necessary to see what is the nature of the said easement. Nature of acquisition of that right is relevant. Many easements acquired by grant may be absolutely necessary for the enjoyment of the dominant tenement in the sense that it cannot be enjoyed at all without it. That may be the reason for the grant also. But easement of grant is a matter of contract between the parties. In the matter of grant the parties are governed by the terms of the grant and not anything else. The grant may be express or even by necessary implication. In either case it will not amount to an easement of necessity under Section 13 of the Act even though it may also be an absolute necessity for the person in whose favour the grant is made. Limit of the easement acquired by grant is controlled only by the terms of the contract. So, if we bear in mind the above mentioned position of law which is laid down in a case **Hero Vinoth (minor) V/s Seshammal 2006(3) ALL MR (SC) 129**, we find that in the instant case though for approaching the plaintiffs' property i.e. 'Saraswati Niwas' right of way through defendants' property i.e. 'Rama Niwas' was necessary

the same has been specifically granted to plaintiffs or the purchasers of 'Saraswati Niwas' in a sale deed executed by the Court Commissioner. So, in the instant case the easement in question has to be treated as an easement by grant. The grant is created as it was necessary.

20. Once it is held that easement in question is a easement by grant as the same was granted because of necessity, the provisions of Section 13 of easement Act (1882) will not be attracted.

21. Much emphasis is given by Shri Deshmukh, learned Advocate for the defendants on the point that in spite of execution of the sale deed and mention therein with regard to passage of 12' width such passage was not actually used by the plaintiffs and material attached in the court proceedings was lying in the said passage upto width of 6' right from the execution of the sale deed till 1963 or thereabout and as such it must be held that alleged right of easement of the plaintiffs has been extinguished. However, it is well settled that easement by grant does not get extinguished under Section 41 of the Indian Easement Act. In the above stated ruling **2006(3) ALL MR SC 129** Their Lordships of the Supreme Court observed :

"The grant may be express or even by necessary

> implication. In either case it will not amount to an easement of necessity under Section 13 of the Act even though it may also be an absolute necessity for the person in whose favour the grant is made. Limit of the easement acquired by grant is controlled only by the terms of the contract. If the terms of the grant restrict its user subject to any condition the parties will be governed by those conditions. Any how the scope of the grant could be determined by the terms of the grant between the parties alone. .....
> .....
>
> "Such a right does not arise under the legal implication of Section 13 nor is it extinguished by the statutory provision under Section 41 of the Act which is applicable only to easement of necessity arising under Section 13. An easement by grant does not get extinguished under Section 41 of the Act which relates to an easement of necessity".

22. It must be noted that there is in fact no cogent and convincing evidence to show that portion of about 6’ width out of the said passage was not at all used by the plaintiffs at any time after the execution of the sale deed. Even if we presume for the sake of argument that for some time the defendants or some one else on their behalf was occupying the suit passage still then that by

itself is not sufficient to hold that right of easement by grant granted in favour of the plaintiffs by virtue of registered sale deed Exh.44 is extinguished. Even as per Section 47 a continuous easement is extinguished when it totally ceases to be enjoyed as such for an unbroken period of twenty years. It has come on record that plaintiffs were all along in fact complaining about the obstruction that is being created by the defendants. So, under such circumstances there is no substannce in the argument advanced by the learned Advocate for the defendants that the alleged right of easement granted in favour of the plaintiffs stands extinguished.

23. Shri Deshmukh, learned Advocate for the defendants canvassed before me that in the instant case the Commissioner had in fact no power to create right of easement in respect of 12’ width portion, because he was not authorised to do so and at the relevant time some of the defendants were minor. However, if we peruse the sale deed in question Exh.44 we find that therein it is clearly mentioned that Nazir of the Civil Court was appointed as a guardian ad-litem for minors and he had given consent for the sale in question. Not only that but it is clearly mentioned in the said sale deed that terms and conditions of the sale deed were fixed at the time of auction and the sale deed is executed by consent of the parties to the litigation. The parties including Jaywant N. Agaskar, Nazir and Indirabai N. Agaskar

have signed the sale deed in question. Not only that but admittedly after execution of the sale deed the same was not at all challenged at any point of time by the defendants after they became major nor defendants challenged the said sale deed on the ground that it is unauthorizedly executed by Advocate Shri B.G.Oka. On the contrary final decree is also passed in the said suit. So, under such circumstances now it does not lie in the mouth of the defendants that terms and conditions embodied in the sale deed are not binding on them.

24. The learned Advocate for the defendants Shri Deshmukh very ingeniously argued before me that as the grant was granted as a result of necessity it should have been restricted or limited only to the extent of 5’ to 6’ width portion as same is sufficient for egress and ingress. According to him, there was no necessity for granting more passage upto 12’ width particularly when it is also admitted fact that at the time of parties to the sale deed were not having any vehicle with them and there was no necessity for them to take a vehicle through the said passage. Firstly, it must be noted that now it is in fact not open for the defendants to advance such argument because the easement in question is an easement by grant. So, it is evident that easement in question is by way of a contract between the parties and Section 20 of Indian Easements Act, 1882 says:

> 20. Rules controlled by contract or title - the rules contained in this Chapter are controlled by any contract between the dominant and servient owners relating tot he servient heritage, and by the provisions of the instrument or decree, if any, by which the easement referred to was imposed.
>
> Incidents of customary easements - And when any incident of any customary easement is inconsistent with such rules, nothing in this Chapter shall affect such incident.

25. So, under such circumstances when admittedly in the sale deed it is specifically mentioned that purchaser viz. plaintiffs are having a right of way of 12’ width passage shown as ABCD we cannot jump to the conclusion that easement granted to the plaintiffs is illegal. Both the Courts have, therefore, rightly held that in this case due weightage shall have to be given to the fact that in the sale deed Exh.44 executed on 20-5-1953 the court Commissioner has given specific right to the purchaser, plaintiffs to have a passage of 12’ width and as such plaintiffs are entitled to make a grievance when defendants did not keep the said passage open.

26. Shri Hardas, learned Advocate for the plaintiffs has drawn my attention to a case **Shamji Ghelabhai and**

**Ors. V/s Jamnadas Meghaji and Ors. AIR 1931 Bom 87** wherein in similar circumstances when defendants were trying to contend that 15′ width passage is not necessary. this Court (Baker J) held that there was nothing in the circumstances of the case to restrain the extent and the nature of the enjoyment of the right granted and that full effect should be given to the grant and the defendant should be compelled to leave a passage 15 feet wide throughout his land as he had contracted to do. So, on the basis of the ratio laid down in the above cited case also it must be held that there is no substance in the contention of the defendants that 12′ width portion was not necessary for going to the plaintiffs′ property and it should be restricted to only 6′.

27. It was tried to be argued on behalf of the defendants that as the material of the criminal Court was kept in the passage for long time but the plaintiffs did not take any action for removal of the same, it must be held that the plaintiffs have acquised. For this purpose the learned Advocate Shri Deshmukh has placed reliance on the provisions of Section 41G of the Specific Relief Act 1963. The said Section says that "an injunction cannot be granted to remove the continuing breach in which the plaintiff has acquiesced. While considering this aspect one must bear in mind that this is a case where there is easement by grant in

favour of the plaintiffs. As already stated above, as such easement cannot be curtailed or restricted or limited in any manner and it also does not stand extinguished because of the fact that same was not used for a very long time. The provision of Section 13 of Easement Act which is applicable to the easement of necessity is not applicable in the instant case. Besides this, there is absolutely nothing on record to indicate that the plaintiff has in fact acquiesced their right. Admittedly, since the year 1963 the Court has shifted to other place and as such the property was removed from the passage in question. So, I do not find any substance in the argument advanced by the learned Advocate for the defendants in this behalf. Besides this it seems that this point was not at all argued before the lower Courts.

28. Shri Deshmukh, learned Advocate for the defendant submitted that the present suit is barred by provisions of Article 58 of the Limitation Act. Article 58 says that the suit for declaration must be filed within 3 years when the right to sue first accrued. It is pertinent to note that according to the plaintiffs that some time in January 1978 the defendants tried to enter upon the property in question, they also started cycle stand in the suit passage and as a result of the same it became impossible for the municipal vehicle even to enter the western side from the road. So, we find that

this is a case where there was in fact continuing wrong and so under such circumstances of the case the suit filed by the plaintiff for declaration and injunction is certainly within time and the same cannot be dismissed on the ground that it is barred by law of limitation.

29. In view of the above discussion, it is very clear that both the courts below have appreciated the evidence on record in its proper perspective and the order passed by the first appellate court is legal and correct. There is no necessity to interfere with the same. Thus there is no substance in these appeals.

30. Both the appeals stand dismissed with costs.

(S.R.SATHE,J)